IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. .....

UNITED STATES OF AMERICA, *ex rel.*
FRANK PARKER,
Petitioner-Appellant,

vs.

PETER B. CAREY, Sheriff of Cook County,
Respondent-Appellee.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

Opinions of the Courts Below.

Although no formal opinion was rendered, your honors will find that the federal trial court certified its ground of decision in the Bill of Exceptions (R. 20), from which we quote:

> "The parties appeared and upon the hearing it was agreed that the facts were as stated in the petition and the return. The difference between the parties was as to the construction to be placed upon the facts.

"Parker claimed that he commenced to serve his jail sentence before he was taken to Leavenworth and that the time continued to run for the reason that the Sheriff and the Marshal had no right to interrupt his sentence. Parker claimed that to deny his liberty was a denial of due process as guaranteed by the due process clause in the 14th amendment.

"On the other hand, the Sheriff contends that Parker was in the custody of the Marshal and the State court had no jurisdiction or power to interfere with the Federal sentence, with which contention the court agrees and therefore holds that the State court had no jurisdiction or power after Parker was committed to the Marshal under the mittimus of the Federal Court, and therefore Parker was remanded, to which ruling Parker then and there duly excepted."

We submit that the Circuit Court of Appeals overlooked this short, but important, portion of the record.

The opinion of the Circuit Court of Appeals is in the record (R. 37). Reported in 135 F. (2d) 205.

Statement of the Case.

Reference is respectfully made to the "Summary Statement of the Matter Involved" in our petition (herein p. 1).

Errors to be Urged.

Reference is respectfully made to our petition under a similar heading (herein p. 2).

Questions Presented.

Reference is respectfully made to our petition under a similar heading (herein p. 3).

Constitutional and Statutory Provisions Involved.

The fourteenth amendment to the Constitution of the United States.

Propositions of Law Relied On and Citation of Cases.

I.

While there is some authority to the effect that sentences imposed by different courts run successively even though the later sentence does not so state, ordinarily, where a person under sentence for a crime is convicted and sentenced for another offense in a different court, the sentences run concurrently unless the judgment in one stipulates that imprisonment shall commence at the expiration of imprisonment under the other conviction or a statute provides a different rule.

15 American Jurisprudence, p. 126, Criminal Law, Sec. 471, citing annotations in 5 A. L. R. 381, 53 A. L. R. 625, 7 L. R. A. (N. S.) 273.

Zerbst v. *Lyman* (C. C. A. 5th), 255 F. 609, 5 A. L. R. 377.

Dickerson v. *Perkins*, 182 Iowa 871, 166 N. W. 293, 5 A. L. R. 374.

II.

Two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions in the judgments to the contrary, and where a defendant is already in custody in execution of a former sentence and the second sentence does not state that the period of imprisonment is to commence at the expiration of the former sentence the sentences will run concurrently in the absence of a statute providing for a different rule, notwithstanding the sentences are pronounced by different courts for different offenses.

People v. *Graydon*, 329 Ill. 398.

III.

A *mittimus* is only a transcript of the minutes of the conviction and sentence duly certified by the clerk, and neither the clerk nor the sheriff has power to control the effect of the sentence of the court by changing the *mittimus* but they can only certify and execute, respectively, the sentence of the court as recorded, and where two writs out of different courts are issued the sheriff cannot execute one and withhold the other until after sentence is served under the former, as it is clearly a judicial function to determine which sentence shall be served first and whether one shall succeed the other.

People v. *Graydon,* 329 Ill. 398.

IV.

When a prisoner who has been legally and properly sentenced and is safely in the proper custody, there is no office for a mittimus to perform.

People v. *Thompson,* 358 Ill. 81, 89.

V.

Our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly procedure.

Ponzi v. *Fessenden,* 258 U. S. 254.

VI.

The Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the federal court be not prevented or the prisoner endangered.

Ponzi v. *Fessenden,* 258 U. S. 254, 255.

VII.

The law is established in Illinois that a convict is imprisoned without due process of law and entitled to his release where it is made to appear that he is held in confinement after his sentence has expired.

People v. *Bowen,* 367 Ill. 589, 593.
People v. *Simon,* 284 Ill. 28.
People v. *Eller,* 323 Ill. 28.

VIII.

It must follow that where the facts are admitted and it appears that his sentence has expired the State, by refusing to inquire into the matter and to grant relief, has denied petitioner a fundamental right to due process as guaranteed by the fourteenth amendment.

IX.

As to the right of a defendant to acknowledge judgment for a fine under section 16 of Division XIV of the Criminal Code of Illinios.

People v. *Horan,* 294 Ill. 314, 320.

X.

The principle of *res adjudicata* is not applicable to proceedings in habeas corpus.

In re Ring, 28 Cal. 247.
Maria v. *Kirby,* 51 Ky. 542.
In re Snell, 31 Minn. 110, 16 N. W. 692.
In re Reynolds, 6 Parker Cr. R. 276.
Ex parte Rossom, 24 Tex. App. 226, 5 S. W. 666.

XI.

Due process of law as guaranteed by the XIV amendment to the Federal constitution requires that petitioner be discharged.

XII.

Habeas corpus will lie where the original detention was legal, but has become illegal by reason of matters *ex post facto,* as where a person is restrained of his liberty under a judgment of conviction containing a sentence which has been served.

12 R. C. L., Habeas Corpus, sec. 29, p. 1210.

Northfoss v. *Welch,* 116 Minn. 62, 133 N. W. 82, 36 L. R. A. (N. S.) 578.

State v. *Wolfer,* 127 Minn. 102, 148 N. W. 896, L. R. A. 1915B 95.

ARGUMENT.

MAY IT PLEASE THE COURT:

The reason we think we are entitled to a review here is that the local federal court took jurisdiction of the parties and the subject matter and not only denied relief but certified in the bill of exceptions its reasons (R. 20) specifically holding that the state court had no jurisdiction or power after Parker was committed to the Marshal. This was the very crux of the disputed point of law. The Circuit Court of Appeals overlooked this decision by the local federal court and treated our appeal as if the federal trial court had declined to decide the important question involved. We here contend that we are entitled to a decision on the point certified by the trial court.

At the outset permit us to say that we realize that the fourteenth amendment does not prevent a State from prescribing the mode and procedure in criminal prosecutions or the mode and extent of punishment. If the State court in the original sentence had ordered Parker to serve his jail sentence after he finished his Federal term we could not be heard to complain. Further, if the State courts had construed the judgment to mean such an order had been entered or implied, we would have no remedy here, even if the language of the sentence, in fact, excluded such construction. In other words, we hope to recognize and distinguish those cases in which the State courts have the final word. We alleged in our petition that the orders of the State court demonstrate that the trial judge intended and ordered that your petitioner serve his jail sentence prior to being removed to the Federal Penitentiary. The State courts in the case at bar have refused to act, and we

contend that a fundamental right of petitioner as a citizen of the United States is being infringed.

The opinion of the Circuit Court of Appeals (R. 38) recites that the Illinois Supreme Court affirmed the lower state court. This is a mistake. There is no appeal allowed by our state practice. The fact is that Parker tried unsuccessfully to get into the Illinois Supreme Court by original petition. Then we endeavored to secure a review of the Illinois Supreme Court by certiorari in this court. No announcement was made by your Honors but we contend that denial of this application meant only that this court refused to review the action of our State Supreme Court. In view of the fact that the action of our State Supreme Court is not a bar to another writ either in the State court or here (Point X, our brief), we contend that the action of this court did not bar our petition in the local federal court. We contend that as a matter of law and practice our petition was entertained by the local federal court upon broader ground than that presented to this court when we attempted to come up before from the State Supreme Court. This was an original application below.

The law is established in Illinois that a convict is imprisoned without due process of law and entitled to his release where it is made to appear that he is held in confinement after his sentence has expired (*People* v. *Bowen*, 367 Ill. 589, 593; *People* v. *Simon*, 284 Ill. 28; *People* v. *Eller*, 323 Ill. 28). It must follow, if we are correct on the law, that where the facts are admitted and it appears that his sentence has expired, the State, by refusing to inquire into the matter and to grant relief, has denied petitioner a fundamental right to due process as guaranteed by the fourteenth amendment.

The petition shows that the original case involving the

substantive crime against the state law was taken to the Supreme Court of Illinois and there affirmed (*People* v. *Moran,* 378 Ill. 461), and that the Supreme Court of the United States denied certiorari (No. 1013, October Term, 1941). The point we now make was not made in the original proceeding nor could it have been raised (*Marx* v. *People,* 204 Ill. 248). We do not seek to question the legality of the original sentence.

Under clause 2 of section 22 of the Illinois Habeas Corpus act the writ lies to secure relief from an expired sentence.

Habeas corpus will lie where the original detention was legal, but has become illegal by reason of matters *ex post facto,* as where a person is restrained of his liberty under a judgment of conviction containing a sentence which has been served (12 R. C. L., Habeas Corpus, sec. 29, p. 1210, citing *Northfoss* v. *Welch,* 116 Minn. 62, 133 N. W. 82, 36 L. R. A. (N. S.) 578, *State* v. *Wolfer,* 127 Minn. 102, 148 N. W. 896, L. R. A. 1915B 95).

So it will be seen that petitioner does not seek to use the writ of habeas corpus as a writ of error as did the prisoner in *Woolsey* v. *Best, Warden,* 299 U. S. 1.

We quote from *Smith* v. *O'Grady,* 312 U. S. 329 (330):

> "But petitioner also contended that his imprisonment was illegal under the federal Constitution. And in denying the writ the Nebraska court necessarily held that petitioner's allegations—even if proven in their entirety—would not entitle him to habeas corpus, even if the petition showed a deprivation of federally protected rights. It was to review this question that we granted certiorari. 311 U. S. 633."

Then we find a quotation from *Mooney* v. *Holohan,* 294 U. S. 103, 113, as follows:

> "Upon the state courts, equally with the courts of

> the Union, rests the obligation to guard and enforce every right secured by that Constitution."

The United States Supreme Court concludes that (332):

> "It is therefore our duty to examine petitioner's allegations in order to determine whether they show that his imprisonment is the result of a deprivation of rights guaranteed him by the federal Constitution."

In the case at bar we do not attack the judgment as in *Smith* v. *O'Grady*, 312 U. S. 329, *Walker* v. *Johnston*, 312 U. S. 275, *Johnson* v. *Zerbst*, 304 U. S. 458, *Mooney* v. *Holohan*, 294 U. S. 103, and *Chambers* v. *Florida*, 309 U. S. 227, but we submit that the reasoning applies here. Each case must be decided upon its facts. We discuss this matter although the jurisdiction of the Court below was not questioned for the reason that we are quite certain that your Honors wish to be satisfied as to this all important element before proceeding further.

Concerning the conflict of jurisdiction in the matter of original judgments we submit that ordinarily the court first acquiring jurisdiction is permitted to keep the same until the matter is disposed of. As was held in *Ponzi* v. *Fessenden*, 258 U. S. 254, our system of state and federal jurisdiction requires a spirit of reciprocal comity between courts to promote due and orderly procedure. In the case at bar the indictment in the State court was returned first, but the case in the Federal court was tried first. We contend that if the Marshal had taken your petitioner to the Federal Penitentiary before the State trial and then the Federal authorities had permitted the State officials to have your petitioner for trial, and the State Court sentenced your petitioner and your petitioner was taken by the Sheriff to the jail to commence his sentence, then the Federal government would have had to wait for their prisoner until he served his State sentence. Or the Fed-

eral authorities would have had to apply to the State court for an order in the premises. In the absence of an order of court the Sheriff had no more right to turn your petitioner over to the Marshal than he had to take your petitioner to his home to work on the Sheriff's lawn.

As was said in *People* v. *Graydon,* 329 Ill. 398, 401:

> "To determine which sentence shall be served first and whether one shall succeed the other is clearly a judicial act, which neither the clerk nor sheriff has power to perform. The clerk can only certify to the order of the court and the sheriff can only execute the sentence of the court as recorded."

And now we contend that the Sheriff, having interrupted the sentence, has no more right to demand service of the remainder of the term than he would have if your petitioner had been working for nineteen months at the home of the Sheriff after the commencement of his sentence. The case supposed by us is stronger than the case at bar because the Marshal did not take your petitioner to the Federal Penitentiary but turned him over to the Sheriff.

All of our argument falls to the ground if the Court below was correct in holding the State Court was powerless to acquire jurisdiction because of the Federal sentence. As we have stated, the Circuit Court of Appeals failed to decide this, the main question presented.

The Marshal in his return to the Federal mittimus (Exhibit C, R. 10) stated that this custody was temporary, but the facts stated in our petition and admitted show that it was not temporary and was for the purpose of the State trial. The consent of the Marshal, and consequently of the Attorney General of the United States, to the State court jurisdiction is evident from his conduct. In the case cited, *Ponzi* v. *Fessenden,* 258 U. S. 254, Mr. Chief Justice Taft said (265):

"But it is argued that when the prisoner is pro-

duced in the Superior Court, he is still in the custody and jurisdiction of the United States, and that the state court can not try one not within its jurisdiction. This is a refinement which if entertained would merely obstruct justice. The prisoner when produced in the Superior Court in compliance with its writ is personally present. He has full opportunity to make his defense exactly as if he were brought before the court by its own officer. *State* v. *Wilson,* 38 Conn. 126, 136. The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty."

It was held in that case that the Attorney General, in view of his statutory functions, has implied power to exercise the comity of the United States in such cases, provided enforcement of the sentence of the Federal court be not prevented or the prisoner endangered. The Marshal is the agent of the Attorney General in this regard and our petition alleges the fact to be that the State sentence was commenced with the knowledge and consent of the Attorney General.

The *Fessenden* case is cited in *Herbert* v. *Louisiana,* 272 U. S. 312, 315, from which we quote:

"It, of course, was essential that the state court have jurisdiction of the persons of the accused. In fact they were before it and were accorded full opportunity to defend. In the absence of any showing to the contrary, and there is none, it properly may be assumed that the United States acquiesced in their arrest and trial on the accusation under the state law, notwithstanding they were then on bail awaiting trial in the federal court on the indictment pending there. Certainly, if the United States were not objecting, the fact that the accused were thus on bail awaiting trial in the federal court presented no obstacle to the arrest

under the process of the state court as a means of acquiring jurisdiction of their persons. *Ponzi* v. *Fessenden*, 258 U. S. 254, 260; *Beavers* v. *Haubert*, 198 U. S. 77, 85; *Peckham* v. *Henkel*, 216 U. S. 483, 486."

In *People* v. *Graydon*, 329 Ill. 398, it was held that two or more sentences of a defendant to the same place of confinement run concurrently in the absence of specific provisions in the judgments to the contrary, and where a defendant is already in custody in the execution of a former sentence and the second sentence does not state that the period of imprisonment is to commence at the expiration of the former sentence the sentences will run concurrently in the absence of a statute providing for a different rule, notwithstanding the sentences are pronounced by different courts for different offenses. And further that a *mittimus* is only a transcript of the minutes of the conviction and sentence duly certified by the clerk, and neither the clerk nor the sheriff has power to control the effect of the sentence of the court by changing the *mittimus* but they can only certify and execute, respectively, the sentence of the court as recorded, and where two writs out of different courts are issued the sheriff cannot execute one and withhold the other until after sentence is served under the former, as it is clearly a judicial function to determine which sentence shall be served first and whether one shall succeed the other.

In the *Thompson* case, 358 Ill. 81, 89, it was held that when a prisoner who has been legally and properly sentenced and is safely in the proper custody, there is no office for a *mittimus* to perform. We submit that the Circuit Court of Appeals failed to apprehend this settled point of state law.

In the case at bar the record shows (Exhibit B, R. 9) that your petitioner had obtained a stay of *mittimus* when

the state judgment was entered. Then the record shows that the sureties surrendered him in open court and he started in to serve his State sentence (R. 9). To make sure that there was nothing to prevent the running of his State court sentence, your petitioner moved for a vacation of the order staying the *mittimus*, which motion was allowed (R. 9). This order of vacation may not have been necessary as the *mittimus* was defunct, but this order entered after your petitioner was in custody shows plainly the intention of the State court to permit your petitioner to start the service of his State court sentence.

The record shows (R. 9) that the parties were present the next day after the surrender and when the order was entered vacating the previous stay of the then defunct *mittimus*. We contend that the respondent should not be permitted to go behind this record and that your Honors are bound to give the same full faith and credit here, if the issue is deemed material. The federal trial judge did not deem it material by reason of his view that the State court was powerless and that all of the orders, entered by the State court after petitioner had been sentenced by the Federal Court, were void.

We contend that the state court being without power, the Sheriff and the Marshal should not be permitted to alter and change the jail sentence. As was said in *Smith* v. *Swope*, 91 F. (2d) 260, 262:

> "The prisoner is entitled to serve his time promptly if such is the judgment imposed, and he must be deemed to be serving it from the date he is ordered to serve it and is in the custody of the marshal under the commitment, if, without his fault, the marshal neglects to place him in the proper custody. Any other holding would give the marshal, a ministerial officer, power more arbitrary and capricious than any known in law. A prisoner sentenced for one year might thus be required to wait forty under the shadow

of his unserved sentence before it pleases the marshal to incarcerate him. Such authority is not even granted to courts of justice, let alone their ministerial officers. Citation of authority is hardly needed to establish so elementary a proposition. *In re Jennings* (C. C.), 118 F. 479, 481; *Albori* v. *United States* (C. C. A. 9), 67 F. (2d) 4, 6. And see *White* v. *Pearlman* (C. C. A. 10), 42 F. (2d) 788, 789."

In the case at bar the situation is reversed, and it is the Sheriff who assumed the right to change the sentence to make it commence to run after the Federal sentence. The Sheriff in the case at bar seeks to assume the power of lending your petitioner out of his custody to serve a Federal sentence and then to compel your petitioner to return to jail and finish his interrupted sentence.

We submit that a correct decision of this point of jurisdiction is of sufficient importance to impel this court to grant certiorari.

A leading case which is instructive in the present situation is that of *In re Jennings*, 118 Fed. 479. It appears that the Marshal for the Northern District of the Indian Territory delivered Jennings to the Marshal of the Southern District for a second trial and conviction. The delivery was made after a conviction in the Northern District. The defendant was discharged on *habeas corpus* after he served his time, counting from the date of the first judgment, although the officers tried to enforce consecutive sentences by delivering Jennings back to the first named District after he had served his second sentence. The issues involved and the points discussed are so closely akin to those in the case at bar that in the absence of a similar case in the reports of this court we suggest that the *Jennings* case be consulted.

Petitioner not only served his year in the Federal penitentiary but, as stated in our petition (R. 5), those au-

thorities added to his term and deprived him of privileges because of the State conviction. Double jeopardy and repetitious punishment are repugnant not only to our law but to decency and fairness, as your Honors well know. We respectfully submit that such imprisonment is contrary to the law of the land and a denial of due process as protected by the Fourteenth Amendment.

The State case which was thought to be of controlling influence in the court below was that of *People* v. *Thompson*, 358 Ill. 81. Permit us to distinguish that case. Brown, the petitioner there, had a *supersedeas* from the Illinois Supreme Court when the Federal authorities took him to Leavenworth to start his federal sentence only. Parker did not have a *supersedeas* as against either the State or the federal judgment at the commencement of the sentences, or until they had both expired. We quote from the *Thompson* Case (85):

> "The warden denies that the sheriff had custody of Brown after the judgment and sentence were entered against him in the criminal court but says that Brown was at all times out on bond, either on stays of *mittimus* or on a *supersedeas* from this court. The return also says that Brown was in the custody of the Federal authorities, and that it was impossible for the sheriff during that time to commit him to the State Prison."

If we are correct in our view that the state court had jurisdiction of the person of Parker (jurisdiction of the subject matter has never been questioned, nor could it be) it must follow that Parker had commenced his jail sentence and the respondent and the Marshal had no right to interrupt that sentence, especially in the absence of any order in either court.

We submit that this case peculiarly requires Federal relief for the reason that the predicament was caused by the

Marshal in violating the command of the Federal *mittimus*, i. e., leaving Parker with the Sheriff until the State judgment was entered, and in then taking Parker away from the Sheriff without any order of court. State courts are slow to condemn the conduct of Federal officers. The Sheriff of Cook County, after Parker was surrendered in open court and had commenced his jail sentence, should not have recognized the demand of the United States Marshal for custody in the absence of a court order. This wrongful act on the part of the Sheriff, we submit, should not compel Parker to do his time twice. The local federal court was mistaken upon the law but recognized the importance of the question involved and the possibility of a mistake by allowing an appeal. The Circuit Court of Appeals failed to pass upon the only point involved.

This court granted certiorari in *United States ex rel.* v. *Kassin Mulligan*, 295 U. S. 396. The case involves a removal from one federal district to another. It is nothing like the case at bar except that it is one where the Circuit Court of Appeals affirmed the lower federal court in dismissing a writ of habeas corpus. The extent of the inquiry to be made below was involved. Our search to date has failed to reveal a case in point as to our claim to certiorari here. Any claim that there is a conflict of decisions, or that the Circuit Court of Appeals has decided a point contrary to law does not fully cover our contention. We submit that the local federal court endeavored to certify an important point to the Circuit Court of Appeals and that that court failed to decide the only question in the case. We rely upon an exercise of the supervisory power of this court.

We respectfully contend that this Honorable Court should grant relief and enter such orders as justice and right require.

Respectfully submitted,

Wm. Scott Stewart,
Counsel for Petitioner-Appellant.